

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 6, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1160

Cir. Ct. No. 1990CF904068

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAVELLE CHAMBERS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
M. JOSEPH DONALD, Judge. *Affirmed.*

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 PER CURIAM. Lavelle Chambers, *pro se*, appeals from an order denying his motion “to void the habitual criminality portion of his sentence.” He also appeals from an order denying his motion for reconsideration. We affirm.

BACKGROUND

¶2 In 1990, Chambers was charged with one count of felony murder as a party to the crime and one count of being a felon in possession of a firearm, both as a habitual criminal. The case proceeded to a jury trial. To prove the second count, the State was required to introduce evidence that Chambers was a felon at the time he possessed a firearm. The State asked the trial court “to take judicial notice of a certified copy” of Chambers’s June 30, 1988 judgment of conviction for operating a motor vehicle without the owner’s consent, a felony. In response, trial counsel said he had “no objection.” The trial court received the exhibit into evidence.¹

¶3 The jury found Chambers guilty of both counts. After the jury was excused, trial counsel moved for judgment notwithstanding the verdict. The State opposed the motion and added: “[T]he State also at this time would move pursuant to the exhibit which is already presented as proof of Felon in Possession of Firearm, the Court make the finding [that] the defendant is a habitual criminal because of a prior felony conviction within the past five years.” In response, trial counsel questioned whether he had been given notice of the habitual criminality enhancer, but then said “never mind” after the State pointed out that the penalty enhancer was in the information. The trial court denied the defense motion for judgment notwithstanding the verdict and continued:

¹ The Honorable Rudolph T. Randa presided over the jury trial and sentenced Chambers. The Honorable M. Joseph Donald denied the motion at issue in this appeal.

[T]he Court will also make a finding that the State asks it to find and make, and; that is, the defendant is, because of the prior record and the information and evidence provided to the Court, one, who has the status of a habitual criminal. So the habitual criminality portion will be entered into and made a part of the record and part of this judgment.

¶4 At sentencing, Chambers faced a maximum sentence of fifty years for the felony murder, which included ten additional years of exposure because he was a habitual criminal. The maximum potential sentence for being a felon in possession of a firearm was eight years, which included six additional years of imprisonment because Chambers was a habitual criminal. The trial court imposed the maximum sentence on each count, consecutive to each other, for a total sentence of fifty-eight years of imprisonment.

¶5 In subsequent years, there were multiple appeals to this court challenging Chambers's convictions, which have not been overturned. *See, e.g., State v. Chambers*, No. 2006AP1281, unpublished slip op. (WI App Oct. 23, 2007).

¶6 In April 2016, Chambers filed the postconviction motion that led to this appeal. The motion cited WIS. STAT. § 973.13 (2015-16),² which provides:

Excessive sentence, errors cured. In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings.

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

The motion alleged that Chambers’s sentence was imposed “in excess of that authorized by law” because the habitual criminality penalty enhancer was not sufficiently proven after trial. *See id.*

¶7 The trial court denied the motion in a written order, and it also denied Chambers’s motion for reconsideration.³ This appeal follows.

DISCUSSION

¶8 When the State seeks to enhance a defendant’s sentence using the habitual criminal statute, WIS. STAT. § 939.62, it must establish the defendant’s repeater status. *See State v. Saunders*, 2002 WI 107, ¶¶14-19, 255 Wis. 2d 589, 649 N.W.2d 263. That status can be established by having the defendant “personally admit[] to qualifying prior convictions” or by having the State prove “the existence of qualifying prior convictions.” *Id.*, ¶19; *see also* WIS. STAT. § 973.12(1). Although “the [S]tate must put the defendant on notice, either in the complaint or the information, that it will be seeking an enhanced penalty based on the defendant’s prior conviction record,” the State does not offer proof until “immediately after verdict, in a presentence investigation report, at a sentencing hearing, or at any time before actual sentencing.” *Saunders*, 255 Wis. 2d 589, ¶48.

¶9 On appeal, “[t]he question of whether penalties based on a defendant’s repeater status were properly applied involves the application of

³ The trial court concluded that Chambers’s motion was procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). On appeal, the State contends that *Escalona-Naranjo* does not bar challenges brought pursuant to WIS. STAT. § 973.13 and that Chambers’s motion is barred only “to the extent Chambers’[s] appeal raises any challenge outside” of that statute. We decline to address whether Chambers’s motion was procedurally barred because his motion fails on substantive grounds.

[WIS. STAT.] § 973.12(1) to a set of undisputed facts,” which is “a question of law to which we apply *de novo* review.” *Saunders*, 255 Wis. 2d 589, ¶15 (italics added).

¶10 In this case, Chambers alleged in his postconviction motion “that the State failed to prove habitual criminality when [it] failed to physically provide the Court with specific and intended evidence post-trial.” Chambers’s motion emphasized that *Saunders* and a subsequent case, *State v. Kashney*, 2008 WI App 164, 314 Wis. 2d 623, 761 N.W.2d 672, both required the State to provide proof of a defendant’s habitual criminality status *after* trial and only to the sentencing judge, rather than the jury.⁴

¶11 Chambers’s motion did not allege that the prior judgment of conviction was inaccurate. Instead, Chambers suggested that the State failed to provide sufficient proof of his prior conviction after the trial because the State “simply defer[red] to an Exhibit submitted during trial for other purposes, without identifying or physically introducing said evidence during post-trial” proceedings.

¶12 On appeal, Chambers repeats many of those arguments.⁵ He implies that the State should have presented a physical copy of the certified judgment of

⁴ In *State v. Saunders*, 2002 WI 107, 255 Wis. 2d 589, 649 N.W.2d 263, the court recognized “that a defendant’s repeater status is not an element of the underlying crime to be proved prior to the verdict” and is instead “heard solely by the sentencing judge” after the verdict. See *id.*, ¶46. The reason for proving repeater status after the verdict is to protect the defendant. See *State v. Kashney*, 2008 WI App 164, ¶11, 314 Wis. 2d 623, 761 N.W.2d 672 (“[D]ue process requires us to keep the repeater evidence away from the decision maker until a finding of guilt on the crime charged ... because repeater evidence is likely to prejudice the jury.”).

⁵ To the extent Chambers is presenting new issues on appeal, we decline to consider them because they were not raised in his postconviction motion. See *State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (“As a general rule, this court will not address issues for the first time on appeal.”).

conviction to the trial court when the State asked the trial court to find Chambers was a habitual criminal. Chambers suggests his habitual criminal status was not adequately proven because the trial court “had to search outside the post-trial record to try to identify the unidentified exhibit, which was merely alluded to by the State before being accepted as proof by the court.” (Three sets of quotation marks and emphasis omitted.) We are not persuaded that Chambers is entitled to relief.

¶13 In *Saunders*, the Wisconsin Supreme Court concluded that the State had adequately proven that the defendant was a habitual criminal under similar circumstances. “Immediately after excusing the jury, the [trial] court engaged in a colloquy with the prosecutor and Saunders’[s] trial counsel” about the defendant’s status as a habitual offender. *Id.*, ¶5. The trial court observed that the information alleged that Saunders was a repeat offender based on a March 22, 1991 felony conviction and added: “[T]here is a judgment of conviction, as matter of fact in the file.” *Id.* The trial court asked trial counsel whether the prior conviction was in dispute and trial counsel indicated it was not.⁶ *Id.* The trial court then stated: “I find that the defendant is a repeat offender under our law.” *Id.*

¶14 Simply put, *Saunders* concluded that the existence of an uncertified copy of the judgment of conviction in the existing court record was sufficient to establish the defendant’s habitual criminality status.⁷ *Saunders* did not require the

⁶ Trial counsel’s statement would not be sufficient, on its own, to establish the defendant’s prior conviction. See *Saunders*, 255 Wis. 2d 589, ¶22 (“[A]n admission under [WIS. STAT.] § 973.12(1) of prior convictions may not ‘be inferred nor made by defendant’s attorney, but rather, must be a direct and specific admission by the defendant.’”) (citation omitted).

⁷ The court in *Saunders* did not require a certified copy of the judgment of conviction, although it said that “the best evidence available will normally be a certified copy of a judgment of conviction.” See *id.*, 255 Wis. 2d 589, ¶55.

State to hand the trial court another physical copy of the document that was already in the record. *See id.*, ¶58 (“We conclude that, under the totality of the information in the record, the court did not err. There was sufficient documentary evidence for the court to find beyond a reasonable doubt that Saunders had been previously convicted of a felony ... and that his conviction made him eligible for sentence enhancement.”).

¶15 In this case, the evidence available to the trial court was arguably better than that provided to the trial court in *Saunders* because here the trial record contained a certified copy of the judgment of conviction, which is normally “the best evidence available.” *See id.*, ¶55. Further, although the State did not reference the exhibit by number, the transcript suggests it was clear that the State was referring to the certified judgment of conviction when it asked the trial court to rely on “the exhibit which is already presented as proof of Felon in Possession of Firearm” and to find that Chambers “is a habitual criminal because of a prior felony conviction within the past five years.” As in *Saunders*, there was a “direct reference” to the document in the record that the State was relying upon. *See id.*, ¶59. Just as *Saunders* did not require the State to hand the trial court a physical copy of a document already in the record, the State was not required to do so in this case, especially where neither Chambers nor his trial counsel opposed the State’s request or objected to the trial court’s reliance on the certified judgment of conviction. As the State argues on appeal, the fact that the State did not “mechanically resubmit the same judgment of conviction in the post-verdict setting” does not mean that it failed to prove Chambers’s habitual criminal status.

¶16 In summary, we reject Chambers’s argument that the habitual criminality penalty enhancer was improperly applied in this case. It was not improper for the State to refer the trial court to the certified judgment of

conviction that was already in the case record, having previously been used to establish an element of the crime of being a felon in possession of a firearm. The trial court was free to rely on that document to make its finding that Chambers was a habitual criminal. We affirm the order denying Chambers's motion to reduce his sentence and the order denying his motion for reconsideration.

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).

